APPENDIX A — MEMORANDUM AND ORDER PURSUANT TO RULE 1:28 OF THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT ENTERED SEPTEMBER 10, 2003

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

00-P-1762

DAVID S. PORTER & another[1]

vs.

FRAMINGHAM SAVINGS BANK & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

David S. Porter and his wife, Carol Porter, appeal pro se from a "corrected final judgment" of the Superior Court entered May 4, 1994, which includes (a) an award to the defendants of $3,649,000 against David Porter and $429,500 against David Porter and his wife, Carol Porter, jointly and severally; and (b) dismissal of the plaintiffs' claims for negligence, breach of fiduciary duty, breach of contract, fraud, and violation of G. L. c. 93A.

The Porters first claim that the trial judge erred in failing to make findings of fact or rulings of law on the claim for

1. Carol Porter.

2. F.S.B. Development Corp.

violation of G. L. c. 93A before entering judgment for the defendants on that claim. Such findings and rulings are required, they assert, by Mass.R.Civ.P. 52(a), 365 Mass. 816-817 (1974). They also argue error in the failure of the judge to rule in their favor, as matter of law, on the 93A claim, based on the defendants' requiring that Carol Porter provide additional security for a loan that was already adequately secured by David Porter's assets. They also argue that judgment was inappropriate because they had adequate evidence to support their other claims under G. L. c. 93A.

As to the Porters' claim that the trial judge erred in failing to make findings of fact or rulings of law, the purpose of rule 52 (a) is to provide assurance, in jury-waived actions, that claims have been fully and fairly considered and to permit informed appellate review, *Nassralla v. Peck*, 403 Mass. 757, 760 (1989). In such cases, we often remand for further findings where none appear in the record, see *Sidney Binder, Inc. v. Jewelers Mut. Ins. Co.*, 28 Mass. App. Ct. 459, 466-467 (1990). For the reasons set forth in the bank's brief, at pages 19-24, any claims of violation of c. 93A based on the defendant's violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1961 et seq., Regulation B, 12 C.F.R. § 202.1 et seq., and the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972(1)(C) and (D), were correctly ruled to be not properly part of the case, either as independent causes of action or as support for the 93A claims. On this record, therefore, the Porters' 93A claim was based only on various claims of misrepresentation and fraud that were submitted to the jury. In response to special questions, the jury expressly found that the Porters failed to prove that the defendants had made any fraudulent representations to them. As the jury expressly

found that the defendants had made no misrepresentations to the Porters, and their Federal claims were not part of the case, the judge correctly ruled that the Porters were not entitled to a judgment under 93A.

The Porters next claim that the judge erred in granting summary judgment to the defendants on counts I, II, and III of the counterclaim. They argue that the judge applied the wrong legal standard and that their affidavits were sufficient to raise as factual issues whether the bank had obtained the note, the guarantees, and the mortgage by fraud. Summary judgment is appropriate if there is no genuine issue of material fact and if, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as matter of law. See Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974); *Gray v. Giroux*, 49 Mass. App. Ct. 436, 438 (2000). "[A] party moving for summary judgment in a case in which the opposing party [has] the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, (1991).

When the claim is on a promissory note, production of the note by the holder and establishing the genuineness of the signature sets out a prima facie case; the burden is then on the maker to establish potential defenses by sufficient affidavit. See *Coupounas v. Madden*, 401 Mass. 125, 129 (1987); *Guiness Import Co. v. DeStefano*, 25 Mass. App. Ct. 366, 366, S.C., 402 Mass. 1101 (1988). Here, the bank

produced the note, and the Porters admitted that the signatures were genuine, leaving the Porters to establish by allegation of specific facts that they had a defense to the notes. Two of the three affidavits on which the Porters rely in this appeal were correctly stricken in the trial court, on motion of the defendants, and were not part of the summary judgment materials. As to the single affidavit that survived and was part of the summary judgment materials, the motion judge ruled it insufficient to defeat the motion for summary judgment, as it contained only generalized claims of fraud and did not adduce specific facts. We agree with the trial judge. For these reasons, and for the reasons set forth by the defendants in their brief, at pages 29-36, summary judgment was properly granted on counts I, II, and III of the counterclaim.

The Porters next claim error in the denial of their motion to amend their complaint. A motion to amend lies within the sound discretion of the judge. While we recognize that "leave should be granted unless there are good reasons for denying the motion," *Mathis v. Massachusetts Elec. Co.*, 409 Mass. 256, 264 (1991), we think that it was well within the motion judge's discretion, on the facts here present, to find that there was undue delay, that there would be undue prejudice to the opposing party, and that trial was imminent. See *Mathis*, at 264. Contrast *Goulet v. Whitin Mach. Works, Inc.*, 399 Mass. 547, 552 (1987). For these reasons, and for the reasons set forth in the defendants' brief at pages 36-41, there was no abuse of discretion in the denial of this motion.

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The Porters also claim error in the refusal of the motion judge to vacate the joint pretrial memorandum. Whether to vacate pretrial memoranda "has to do with the management of the case, and, as such, is committed to the sound discretion of the [motion] judge." *Greenleaf v. Massachusetts Bay Transp. Authy.*, 22 Mass. App. Ct. 426, 429 (1986). For the reasons set forth in the defendants' brief at pages 42-47, we see no abuse of discretion in the denial of the motion.

Finally, the Porters claim that the entire proceedings were so laden with error that substantial justice requires that there be a new trial. Evidence of manifest injustice "must be weighty and of such nature as to its credibility, potency, and pertinency to fundamental issues in the case as to be worthy of careful consideration." *Davis v. Boston Elevated Ry. Co.*, 235 Mass. 482, 495 (1920). On our review of the entire record, we see no basis for considering such relief.

Judgment affirmed.

By the Court (Armstrong, C.J., Gelinas, & Kantrowitz, JJ.),

s/ Lena M. Wong
Asst Clerk

Entered: September 10, 2003.

APPENDIX B — CORRECTED FINAL JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS DATED APRIL 28, 1994

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 90-4263-C

DAVID S. PORTER,
CAROL ANN PORTER and
PHEASANT LANDING LIMITED PARTNERSHIP,

Plaintiffs,

vs.

FRAMINGHAM SAVINGS BANK and
F.S.B. DEVELOPMENT CORP.,

Defendants.

CORRECTED FINAL JUDGMENT

This cause came on for trial before the Court and a jury on March 14, 1994. Upon the jury's verdict returned on March 29, 1994, and upon the Court's prior rulings in this matter, judgment on plaintiffs' Verified Complaint shall and does hereby enter as follows:

1. Judgment for both defendants on Counts I and III-XI of the Verified Complaint with no costs; and

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2. Judgment for defendant F.S.B. Development Corporation on Count II of the Verified Complaint with no costs.

Upon the jury's verdict returned on March 29, 1994, and upon the Court's prior rulings in this matter, judgment on defendants' Amended Counterclaim shall and does hereby enter as follows:

1. Judgment for the defendant (plaintiff in counterclaim) Framingham Savings Bank on Count I of the Amended Counterclaim against plaintiff (defendant in counterclaim) David S. Porter in the amount of $2,790,000 with interest and without costs;

2. Judgment for the defendant (plaintiff in counterclaim) F.S.B. Development Corporation on Count II of the Amended counterclaim against plaintiff (defendant in counterclaim) David S. Porter in the amount of $859,000 with interest and without costs;

3. Judgment for defendant (plaintiff in counterclaim) F.S.B. Development Corporation on Count III of the Amended Counterclaim against plaintiffs (defendants in counterclaim) David S. Porter and Carol Ann Porter, jointly and severally, in the amount of $429,500 with interest and without costs;

4. Count IV of the Amended Counterclaim is dismissed with prejudice;

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5. Judgment for the plaintiff (defendant in counterclaim) David S. Porter on Counts V and VI of the Amended Counterclaim without costs.

So ordered.

s/ Judith A. Cowin
Judith A. Cowin
Justice of the Superior Court

Dated: May 9, 1994

Correcting Final Judgment
Entered on Docket 4 May 1994

Entered 5/11/93

APPENDIX C — MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR COUNTERCLAIM OF THE COMMONWEALTH OF MASSACHUSETTS SUPERIOR COURT DATED APRIL 2, 1993

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
No. 90-4263-C

DAVID S. PORTER, and others[1]

vs.

FRAMINGHAM SAVINGS BANK, and another[2]

The parties' dispute revolves around the purchase and development of land in Needham and the taking of loans to accomplish that objective. On May 8, 1991 the plaintiffs filed a complaint alleging unfair and deceptive trade practices pursuant to G. L. c. 93A as well as other counts relating to claims of malice, fraud, intentional infliction of emotional distress, and extortive actions prohibited by the RICO statute. Defendants counterclaimed alleging default under a

1. Carol Ann Porem and Pheasant Landing Limited Partnership.

2. F.S.B. Development Corp.

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$2,900,000.00 note (Count I), default under a $550,000.00 note (Count II), and default under a guaranty (Count III), as well as other counts not relevant to their current motion. Before the court now is a motion by the plaintiffs for partial summary judgment on their 93A claim, and a motion by the defendant for partial summary judgment on Counts I, II, and III as set forth in their cross complaint.

FACTS

The undisputed facts as established by affidavits, verified complaints, and depositions are as follows. In order to purchase and develop certain property in Needham, Massachusetts ("Pheasant Landing property"), the plaintiff, David Porter ("Porter"), entered into an agreement with the defendant, F.S.B. Development ("FSBDC") on October 1, 1986. Porter was the general partner, and FSBDC (a wholly owned subsidiary of Framingham Savings Bank) was a limited partner. Porter, in his capacity as general partner, executed a note to Framingham Savings Bank ("FSB") in the amount of $2,011,000.00 which was secured by a first mortgage on the Pheasant Landing property. On March 17, 1987, Porter, as general partner, executed a note to FSBDC in the amount of $550,000.00 which was secured by a second mortgage on the Pheasant Landing property. On the same date, Porter and Carol Ann Porter individually executed a guaranty for up to half of the liabilities of the Partnership, and this guaranty was secured by a mortgage given to FSB on the Porters' jointly owned residence.

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Framingham Savings Bank agreed to refinance the development project. They cancelled the $2,011,000.00 note and executed a new note to Porter as general partner in the amount of $2,900,000.00. The bank subordinated its existing second mortgage on the Pheasant Landing property to a new first mortgage on the property to secure the $2,900,000.00. As a result, only the $550,000.00 note to FSBDC was then subject to Porter's and Carol Ann Porter's guaranty for half the liabilities of the partnership, i.e., $275,000.00.

When the Porters failed to repay the matured loans upon demand, and upon their failure of performance under the terms of their guaranty, FSB held a duly noticed foreclosure auction of the Pheasant Landing property pursuant to the terms of its first mortgage on that property. The bank was the high bidder on each of the four lots. The proceeds from the auction totaled $1,430,000.00.

The outstanding balance due on the $2,900,000.00 note was $2,898,618.40, so that subtracting the auction proceeds from that amount left a principal balance of $1,468,618.40. Interest and late charges through April 25, 1991 equaled $709,005.69, and collection costs, including legal fees and foreclosure expenses totaled $133,424.68 as of the date of the auction. The total deficiency (principal, interest, costs, and fees) on this note as of April 25, 1991 was $2,311,048.77.

The principal balance due on the $550,000.00 note as of the date of auction was $549,900. Interest accrued as of April 25, 1991 was $138,896.06. This, added to the outstanding principal balance, left a deficiency of $688,796.08 on April 25, 1991. The two outstanding loans combined, plus interest, costs, and legal fees totaled $2,999,844.83.

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The bank continues to hold a mortgage in the amount of $275,000.00 on the Porter's residence as security for their guaranty. Porter asserts in his memorandum in support of his motion for partial summary judgment that "[t]he Plaintiff's (sic) have been unable to sell or refinance the property because the [Framingham Savings] Bank and Bank DC continue to hold a wrongful mortgage on the property. . . ." This is an unsworn statement which the court may not construe as an undisputed fact, nor consider in its deliberations on the parties' motions.

DISCUSSION

A motion for summary judgment is in order and shall be granted if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of showing that there is no genuine issue as to any material fact on every relevant issue, and that the moving party is entitled to judgment as a matter of law. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 808-809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a material fact. *Pederson v. Time Inc.*, 404 Mass. 14, 17 (1989); *Madsen v. Erwin*, 395 Mass. 715, 719 (1985). The courts, however, should not weigh the evidence, assess credibility or find facts. *Kelley v. Rossi*, 395 Mass. 659, 663 (1985). If the parties are disputing any material fact, summary judgment is improper.

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Plaintiff's Motion Pursuant to G.L. c. 93A.

The plaintiffs assert that the Framingham Savings Bank and F.S.B. Development Corp. engaged in unfair and deceptive practices by recording and then failing and refusing to discharge the mortgage on the plaintiffs' property. The plaintiffs assert further that the bank and F.S.B Development Corp. obtained the mortgage by fraud. In their affidavits, the plaintiffs state that various promises and representations were made by the defendants in order to induce them to sign documents giving a guarantee secured by a mortgage to the defendants. The defendants deny these allegations.

These conflicting assertions relate to issues of material fact and require an evidentiary hearing before the trier of fact. Accordingly, the plaintiffs' motion for partial summary judgment is denied.

Defendants' Motion on Counterclaim I, II and III

Determination of this motion is dependent upon whether certain loans were made by FSB and FSB Development Corp. to David Porter, whether David Porter and Carol Porter gave a guaranty to FSB secured by a mortgage on their residence, and whether David Porter and Carol Porter defaulted on these loans and on the guaranty.

Based on the undisputed facts as set forth above, all these events took place. FSB has produced the loan and guaranty notes in question, and neither David Porter nor Carol Porter has denied the authenticity of their signatures on the notes. "Unless specifically denied in the pleadings, each signature

on an instrument is admitted." G.L. c. 106, §3-307(1). "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the [obligor] establishes a defense." G.L. c. 106, §3-307(2). Allegations of fraud or questions concerning the integrity of the note are insufficient, however, to carry the obligor's burden of proof once a prima facie case has been made establishing the authenticity of the obligor's signature. *Courpounas v. Madden*, 401 Mass. 366, 371 (1945).

As evidenced by the signed notes, there is no question of fact that certain loans were made by FSB and FSB Development Corp. to David Porter and that David Porter and Carol Porter gave a guaranty to FSB secured by a mortgage on their residence. Furthermore, it is clearly established that David Porter and Carol Porter defaulted on their various obligations under the terms of these notes. Summary judgment is therefore appropriate as a matter of law as to Counts I, II, and III of the defendants' counterclaim.

ORDER

For the reasons stated above, plaintiffs' motion for partial summary judgment is ***DENIED.*** Defendants' motion for partial summary judgment as to Counts I, II, and III of their counterclaim is ***ALLOWED.*** Judgment shall enter accordingly.

s/ Barbara A. Dortch
Barbara A. Dortch
Justice of the Superior Court

Dated: April 2, 1993

APPENDIX D — ORDER OF THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS DENYING F.A.R. APPLICATION DATED OCTOBER 29, 2003

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS
One Beacon Street, Third Floor, Boston, Massachusetts 02108
(617) 557-1020

RE: Docket No. FAR-13673

DAVID S. PORTER & another

vs.

FRAMINGHAM SAVINGS BANK & another

Middlesex Superior Court No. MICV1990-04263
A.C. No. 2000-P-1762

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 10/29/03, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused)

Susan Mellen, Clerk

Dated: October 29, 2003

APPENDIX E — STATUTES AND REGULATIONS INVOLVED

CHAPTER 22—TYING ARRANGEMENTS

12 U.S.C. § 1972

§ 1972. Certain tying arrangements

(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

* * *

(C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(D) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

* * * *

Appendix E

SUBCHAPTER IV—EQUAL CREDIT OPPORTUNITY

15 U.S.C. § 1691

§ 1691. Scope of prohibition

Activities constituting discrimination

(a) It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction—

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

* * * *

Appendix E

Regulation B (Equal Credit Opportunity)

12 C.F.R. § 202.1

§ 202.1 Authority, scope and purpose.

(a) *Authority and scope.* This regulation is issued by the Board of Governors of the Federal Reserve System pursuant to title VII (Equal Credit Opportunity Act) of the Consumer Credit Protection Act, as amended (15 U.S.C. 1601 *et seq.*). Except as otherwise provided herein, this regulation applies to all persons who are creditors, as defined in § 202.2(1). Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 7100-0201.

(b) *Purpose.* The purpose of this regulation is to promote the availability of credit to all creditworthy applicants without regard to race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); to the fact that all or part of the applicant's income derives from a public assistance program; or to the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The regulation prohibits creditor practices that discriminate on the basis of any of these factors. The regulation also requires creditors to notify applicants of

action taken on their applications; to report credit history in the names of both spouses on an account; to retain records of credit applications; to collect information about the applicant's race and other personal characteristics in applications for certain dwelling-related loans.

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12 C.F.R. § 202.2

§ 202.2 Definitions.

* * *

(a) *Account* means an extension of credit. When employed in relation to an account, the word use refers only to open-end credit.

* * *

(e) *Applicant* means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers, and similar parties.

* * * *

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12 C.F.R. § 202.7

§ 202.7 Rules concerning extensions of credit.

(a) *Individual accounts.* A creditor shall not refuse to grant an individual account to a creditworthy applicant on the basis of sex, marital status, or any other prohibited basis.

* * *

(d) *Signature of spouse or other person—* (1) *Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

* * * *

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940 CMR: OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

3.16: General

Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of M.G.L. c.93A, § 2 if:

* * *

(4) It violates the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal consumer protection statutes within the purview of M.G.L. c. 93A, § 2.

* * * *